"THE DISCLOSURE REGIME BEFORE THE ICC: THE RIGHT TO A FAIR TRIAL"

by

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Fairness is what justice really is.
Potter Stewart

In recent developments before the court, the International Criminal Court[1] had its fair share of trouble in trying to assure a fair and objective trial. On the 11th of June 2008, the proceedings against the ICC's first defendant, Thomas Lubanga Dyilo from the Democratic Republic of the Congo (DRC)[2], came to an abrupt halt, when Trial Chamber I decided that, due to numerous failures in the disclosure process leading up to the trial, the proceedings had reached such a degree of irregularity that it was ''*now impossible to piece together the constituent elements of a fair trial*''.[3] It therefore ordered a stay of proceedings.[4] This was because the Office of the Prosecutor[5] was unable to disclose to the defence exculpatory and mitigating evidence that had been provided confidentially by the United Nations and other organizations. In due course Trial Chamber I lifted in its oral decision from 18 November 2008, the stay of the proceedings in the *Case vs. Thomas Lubanga Dyilo* and thereby allowed the case to continue.[6]

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[1] Hereinafter ICC.

[2] Case No. ICC-01/04-01/06, *Prosecutor v. Thomas Lubanga Dyilo*; Thomas Lubanga Dyilo is accused of the war crimes of conscripting and enlisting children under the age of 15 into the Forces Patriotiques pour la Liberation du Congo (FPLC), the military wing of the Union des Patriotes Congolais (UPC), and of making use of child soldiers under the age of 15 in the hostilities in Ituri during the period between September 2002 and 13 August 2003.

[3] 1CC-01/04-01/06-H01, *Prosecutor v. Thomas Lubanga Dyilo Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008* 13 June 2008, para. 93. [hereinafter*: Thomas Lubanga Dyilo, Decision on non-disclosure*, para]

[4] *Thomas Lubanga Dyilo, Decision on non-disclosure*, para. 13

[5] Hereinafter OTP

[6] ICC-01-04-01-06-T-98-ENG, *Prosecutor v. Thomas Lubanga Dyilo* Status Conference 18 November 2008 Hearing Transcript, p. 3, lines 21 – 25, p. 4, line 1.

Along this prominent decision the present paper aims to draw a line along the duty to disclose evidence to the accused and its causal relevance for his right to a fair trial in proceedings before the ICC.

One fundamental principle of criminal procedural law – *lex certa* – prescribes, that before a trial commences the accused should be aware of the charges and the case against him and herewith approves the fundamental principle *audi alteram partem* ("hear the other side") akin to due process. A regular occurrence in criminal proceedings – domestic or international– is the discord between OTP, the chambers and the defence over the timing and manner about the disclosure of evidence. In accordance with this, the Rome Statute of the International Criminal Court[7] contains several provisions that set out basic rights of the accused. Accordingly Art. 67, which encapsulates the defendant's fundamental rights in proceedings before the ICC[8] provides for a "fair hearing" and requires, *inter alia*, that the accused has "*adequate time and facilities for the preparation of his or her defence*" and further warrants that the trial is conducted consistent with the Rules of Procedure and Evidence.[9]

I. Application of Human Rights Principles before the ICC

The threshold for international criminal proceedings with regard to the adherence to International Human Rights Law was principally set forth upon the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY).[10] The then UN Secretary General stated it is essential that in its criminal trial proceedings the ICTY adheres fully to universal human rights principles such as those specified in Art. 14 of the International Covenant on Civil and Political Rights and Art. 6 of the European Convention of Human Rights. Similarly Art. 21 (3) of the Rome Statute determines that "*the application and interpretation of law (…) must be consistent with internationally recognized human rights*."[11]

In this regard the Rome Statute and the RPE contains regulations and sets forth measures that safeguard the rights of the accused in the course of the proceedings. This framework ensures that individuals accused of the world's most serious offences are subject to due process of law.

II. Equality of Arms

[7] Hereinafter the Rome Statute.
[8] See also the International Covenant on Civil and Political Rights Art. 14, (1976) 999 U.N.T.S. 171, and European Convention of Human Rights, Art 6, para. 3, lit d.
[9] Hereinafter RPE.
[10] Hereinafter ICTY.
[11] Art. 21 ICC Statute.

For smooth and effective proceedings, it is essential for the defence to have a clear and comprehensive view of the prosecution's strategy in order to prepare its case cohesively. The defence must have a clear and advance understanding of the rules to be applied. There ought to be no surprises.[12] Furthermore the defence must never be placed at a ''substantial disadvantage'' *vis a vis* OTP in preparing its case.[13] The relationship between this wider concept of fair trial and the notion of "Equality of Arms" was further elaborated in the Case *The Prosecutor v Duško Tadic* before the ICTY, where the appeals chamber contested that the notion

"entitles both parties to equality before the court, giving them same access to the powers of the court and the same right to present their cases….the principle does not call for equalizing the material and practical circumstances of the two parties."[14]

Although there is no express reference to this core principle neither in Art. 14 of the International Covenant on Civil and Political Rights, nor in Art. 6 of the European Convention of Human Rights, it is generally agreed upon that it depicts an essential element of a fair trial.[15] According to this the Rome Statute mandates the chambers to ensure the fairness and expeditiousness of proceedings, while guaranteeing full respect to the rights of the defendants as protected by the statutory provisions and regulations.[16] As already indicated above, Art 67 (1) of the ICC Statute, which sets out minimum procedural guarantees, vests the accused with a range of indispensable judicial rights and recognizes the force of the concept of "Equality of Arms" which permeates the current law of fundamental human rights.

This statutory "Equality of Arms" enshrined in the legal framework of the ICC becomes furthermore obvious with regard to the defence's preparation by the evidence available to it. So vast are the resources available to the ICC in the pursuit of its mandate that unless the duty to disclose is placed firmly and squarely upon the shoulders of OTP, the fairness of the processes of criminal justice, the maintenance of that crucial balance substantiated by the equality of arms principle, would always be in doubt.[17] In order to ensure this the Rome

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[12] Nahamya/Diarra, "Disclosure of Evidence before the International Criminal Tribunal For Rwanda" (2002) 13 *Criminal Law Forum*, 339, 339.
[13] *Ankerl v. Switzerland*, E.C.H.R., 1996-V, p. 1565, para. 38.
[14] Case No. IT-94-1-A *Prosecutor v. Dusko Tadic*, Appeals Chamber Judgment, 15 July 1999, para. 37
[15] Trechsel, *Human Rights in Criminal Proceedings*, pp. 94-95.
[16] Negri, "Equality of Arms – Guiding Light or Empty Shell".in Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, p. 25.
[17] Smellie., "The Prosecutions Duty of Disclosure: The Case of a Global Standard", (2004) ISRCL Conference Montreal, available at *www*.isrcl.org/Papers/2004/Smellie.pdf (last visited on 08/12/2008).

Statute seeks to compensate factual or procedural disadvantages of the defence by compelling the OTP in Art. 54 (1) (a) and (f) of the Rome Statute to investigate incriminating and exonerating circumstances alike and to disclose all evidence to the defence that appears relevant to both, the defence´ or the prosecution case.

III. Disclosure and the Rights of the Defence Enshrined in the ICC Statute

One of the fundamental rules of the adversarial trial is that the Prosecutor must provide the defence with all the documents and other materials that will be introduced into evidence to prove the guilt of the accused.[18] "Equality of Arms" implies that each party must be afforded a "*reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent*."[19] In this regard a system of disclosure determines that the accused or his defence team is granted access to the documents, records, etc. necessary for the preparation of his or her defence. Such access is to ensure the advance knowledge of the prosecutorial case and the right to disclosure of evidence which favours the defence case. [20]

Numerous Rules and Regulations in the ICC´s legal framework govern a regime of disclosure as well as its timing and details the mode of disclosure during the confirmation hearing and trial phase.[21] In this respect Art. 63 (3) (c) stipulates that the Trial Chamber shall call for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for the trial.[22]

However the administration of disclosure at the pre-trial and trial-stage have left a number of issues on disclosure open to resolution by the court, including the question of timing, *e.g.* whether the majority of the evidence should be disclosed prior to the confirmation hearing or only prior to the beginning of the trial, and the core question if sanctions should be directed a against a party violating its disclosure obligations.[23]

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[18] Zappala, Human Rights in International Criminal Proceedings, p. 123; Trechsel., *Human Rights in Criminal Proceedings*, p. 92, 94.

[19] *Dombo Beheer B.V. v. The Netherlands* (European Court of Human Rights, unreported 27 October 1993), para. 33.

[20] McIntyre, "Equality of Arms – Defining Human Rights in the Procedure of the International Criminal Tribunal for the Former Yugoslavia" (2003) 16 *Leiden J. Int`L.*, 269, 269; Tochilovsky., "Prosecution Disclosure Obligations in the ICTY and ICTR", (2004) Guest lecture held at the ICC, available at: http://www.icccpi.int/library/organs/otp/042307_Tochilovsky.pdf (last visited on 02/12/2008).

[21] In particular Arts. 54(3)(e), 61(3) and (6), 67(2), 68(5), 72 ICC Statute and 76–84, 121 RPE.

[22] Bitti, G., "Art. 64. Functions and Powers of the Trial Chamber" in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, p. 809.

[23] For in depth analyses compare, Brady., "Chapter 5. Disclosure of Evidence" in Roy (ed.), *The International Criminal Court : the Making of the Rome Statute- Issues, Negotiations, Results*, pp. 403, 413, 424.

A. Preliminary Issues on Disclosure

The court has the authority to admit all evidence that it considers necessary for the determination of the truth. The ICC can decide upon the relevance or admissibility of any evidence and shall assess the probative value of the evidence and any apparent prejudice that such evidence might cause to a fair trial. The statutory disclosure obligation is carried out *inter partes*. Thus the Prosecutor has a duty to disclose information or material to the accused, which in any way tend to suggest his innocence or mitigate his guilt, or which may affect the credibility of the prosecution´ evidence.[24] In this regard it is important to stress that the Prosecutor's duty, is proactive in nature and does not depend on the defence requesting the disclosure or the court ordering it. Furthermore in factual application of the rules governing the disclosure regime the prosecution may not compound all types of relevant evidence in one single submission and thereby burden the defence with the task of separating the incriminating from the exonerating evidence during its review of the materials. The prosecution is obliged to disclose incriminating and exculpatory evidence to the defence separately. In the context of the modality of disclosure the Pre-Trial Chamber (PTC)[25] plays a significant role in the applicable process. The role of the PTC is primarily akin to an '*umpire*'[26] that may act on its own initiative and provides assistance upon request. The PTC fulfils in particular the paladin's role of the suspect's right to be sufficiently informed about the charges against him. The PTC is furthermore in control of the disclosure process regarding those materials which the parties intend to use at the confirmation hearing.[27]

B. Prosecution Disclosure prior to the Confirmation Hearing

The prosecutor has no statutory duty to disclose all the evidence before the confirmation hearing, but he is however required to disclose the incriminating evidence, on which he

[24] See Art. 67(2) in conjunction with Art. 54(1)(a) ICC Statute; Negri, "Equality of Arms – Guiding Light or Empty Shell".in Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, p. 56.
[25] Hereinafter PTC.
[26] Scheffer , "A review of the Experiences of the Pre-Trial Chamber and Appeals Chamber of the International Criminal Court regarding the Disclosure of Evidence" (2008) 21 *Leiden Journal of Int`L.* 151, 157.
[27] Rule 122(1) RPE.

intends to rely during the confirmation hearing.[28] This duty corresponds with the already elaborated statutory rule of Art 67(2) which states that: "*[T]he Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused.*"[29] According to Art. 67(2) the *formula* of potentially exculpatory material even embraces evidence containing both incriminating and potentially exonerating aspects. As it has already been indicated above, these pieces of evidence should be disclosed by way of two separate categories containing incriminatory as well as exculpatory evidence. Accordingly the Prosecutor shall, subject to Rules 81 and 82 of the RPE, grant access to any documentary material, including photographs and other tangible objects in his possession or control, which are subject to the preparation of the defence or are intended for use by the Prosecutor at the confirmation hearing or at trial.

C. Prosecution Disclosure after the Confirmation Hearing

Since the bulk of the exculpatory evidence should ideally have been disclosed prior to the confirmation hearing, the larger part of the evidence disclosed after the confirmation hearings will consist of the incriminating evidence which OTP intends to present during trial.[30] To expedite this disclosure process the Chamber may call upon the OTP[31] which is expected to provide all participants with a document called ‘‘*summary of presentation of evidence*’’, which purpose is to explain the prosecution case ‘‘*by reference to the pieces of evidence including witness statements which the prosecution intends to rely upon and how the evidence relates to the charges*.”[32]

A public redacted form of the “*summary of presentation of evidence*” must also be served on the victims and their legal representatives.[33] The prosecution may, for example, continue its investigations even after the confirmation of the charges hearings and carry on disclosure of

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[28] Arts. 61(3)(b), 67(1)(a) and (b) ICC Statute; Rules 76, 77 RPE: Scheffer , “A review of the Experiences of the Pre-Trial Chamber and Appeals Chamber of the International Criminal Court regarding the Disclosure of Evidence” (2008) 21 *Leiden Journal of Int`L*,. 151, 163.
[29] Ambos/Miller, “Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective”, (2007) 7 *International Criminal Law Review*, 335, 343.
[30] On the modes of disclosure see Rules 77, 78 RPE.
[31] The legal basis for such an order is the general competence of the Trial Chamber under Art 63 (3)(a) and (c) ICC Statute.
[32] ICC-01/04-1/06-1019, *Prosecutor v.Thomas Lubanga Dyilo Decision Regarding the Timing and Manner of Disclosure and the Date of Trial* Trial Chamber I 9 November 2007, para. 26; ICC-01/04-1/06-T-52 *Prosecutor v. Thomas Lubanga Dyilo* Hearing Transcript 1 October 2007, p. 40, lines 13-21.
[33] ICC-01/04-1/06-1119 *Prosecutor v. Thomas Lubanga Dyilo Decision on victim’s participation* Trial Chamber I 18 January 2008, para. 110.

the newly discovered evidence. Rule 84 RPE describes both prosecution and defence disclosure as a continuing process.[34]

D. Disclosure-failure and legal consequences ahead

The delayed service or extensive and highly redacted form of disclosure often results in the late start of trial or adjournments during the pre- trial and trial stage, as best exemplified in the Case *Prosecutor vs Thomas Lubanga Dyilo*. Such conduct infringes on the fundamental rights of the accused to a fair and expeditious trial and impacts directly upon defence` preparation in for the trial. According to this the litigation of disclosure issues in the pre-trial phase of international trials has often been extremely time-consuming.[35] The strict application of viable sanctions for breach of disclosure obligations would undoubtedly expedite proceedings, although at present, there is little deterrent or remedy available in international criminal procedural law.[36] The rules and regulations within the legal framework of the ICC do not specify which sanctions can be put onto OTP for the delayed or the "*over-redacted*" disclosure of evidence. The prominent international lawyer *David Scheffer* has suggested that the court, represented through one of its Chambers may order disclosure instead or sanction OTP by delaying either the approval of an arrest warrant, a confirmation hearing, or the beginning of the trial phase.[37]

IV. Confidentiality Agreements

Justice cannot be administered without the cooperation of those with relevant information. The common understanding is that justice is best served when all relevant evidence is placed before the fact-finder in any particular case. In general evidentiary rules are created to improve the accuracy of fact-finding. Evidentiary privileges[38] (the right to refuse to give

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[34] Swoboda, "The ICC Disclosure Regime – A Defence Perspective", (2008) 19 *Criminal Law Forum*, 449, 454-455.

[35] See Higgins, "Fair and Expeditious Pre-Trial Proceedings, the Future of International Criminal Trials" (2007) *Journal of International Criminal Justice,* 394, 396.

[36] In 2001, the ICTY Judges adopted Rule 68 bis RPE which provides that the 'Pre-trial Judge or the Trial Chamber may decide *proprio motu*, or at the request of either party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the Rules'.

[37] Scheffer , "A review of the Experiences of the Pre-Trial Chamber and Appeals Chamber of the International Criminal Court regarding the Disclosure of Evidence" (2008) 21 *Leiden Journal of Int`L.*, 151, 162.

[38] On the non disclosure of evidence in international criminal proceedings provided by the International Committee of the Red Cross, see Jeannet, "Non Disclosure of Evidence before International Criminal Tribunals: Recent Developments regarding the International Committee of the Red Cross" (2001) 50 *International and Comparative Law Quarterly*, 643, 656.

evidence) are usually disfavoured in legal proceedings, as they may have the effect of potentially leading to "less-than-perfect" results. Evidentiary privileges run counter to the premise that justice is best served when all relevant evidence is made available.[39]
With regard to the judicial proceedings before the ICC the relevant provision is Art. 54 (3) (e) Rome Statute, which serves as an incentive for cooperation and support Confidentiality agreements under Art. 54 (3) (e) should ensure that there is a constant flow of information to the court without having to put the mandate of the informing agency or the security of its staff at risk.[40] This holds particularly true in the Relationship Agreement between the ICC and the United Nations which in accordance with Art. 2 of the ICC Statute came into effect on the 4th October 2004[41], bringing the court into a treaty based relationship with the United Nations.[42] According to Art. 18(3) of this agreement:

"[…] the United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nation."

The use of such non disclosed, confidential evidence – even if only ''*springboard evidence*''[43] *e.g.* evidence used solely for generating further evidence with lead potential – may compromise the fairness and balance of the legal proceedings. It is therefore expressly provided that any such measures as laid down in the confidential agreements taken by the ICC with the information provider, must be exercised in a manner that is not prejudicial to or inconsistent with the rights of the accused and the standards that ensure a fair and impartial trial.[44] This holds in particular true, if the evidence provided on the basis of confidentiality is of exculpatory nature. In the Case *Prosecutor vs. Thomas Lubanga Dyilo*, the prosecution

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[39] Rona, "The ICRC Privilege Not to Testify: Confidentiality in Action" (2002) 845 ICRC Review, 207, 213-214; for an in-depth analysis of exception on the obligation to disclose evidence provided by International Organisations and the existing jurisprudence before International Criminal Tribunals in this aspect see La Rosa, "Humanitarian Organizations and International Criminal Tribunals, or trying to Square the Circle", (2006) 861 *ICRC Review*, 169, 175.
[40] ICC-01/04-1/06-T-52 *Prosecutor v. Thomas Lubanga Dyilo* Hearing Transcript Trial Chamber I 1 October 2007, paras. 69–70.
[41] ICC-ASP/3/Res.1, Negotiated Draft Relationship Agreement between the International Criminal Court and the United Nations.
[42] Kress, "The Procedural Texts of the International Criminal Court, (2006) *Journal of International Criminal Justice*, 1, 6.
[43] *Thomas Lubanga Dyilo, decision on non-disclosure*, paras. 72, 76.
[44] Art 68 ICC Statute; for an in-depth analysis of exceptions *ipso facto* and *ipso iure* on the obligation to disclose and the existing jurisprudence in this aspect La Rosa, "Humanitarian Organizations and International Criminal Tribunals, or trying to Square the Circle" (2006) 861 *ICRC Review*, 169, 176.

gathered more than 50 per cent. of its evidence by way of confidentiality agreements, a considerable amount of which constituted evidence of an exculpatory nature.[45]
In this case Trial Chamber I repeatedly urged OTP to ensure that the confidentiality agreements were lifted. The fact that the United Nations which was the main provider of the non-disclosed material had not been convinced by OTP to lift the confidentiality on a significant number of documents containing potentially exculpatory or mitigating evidence, made the Trial Chamber I pull the emergency break, by deciding on 13th June 2008 to stay the proceedings[46] and on the 2nd July 2008 to order the release of the defendant.[47] Trial Chamber I noted that OTP has made use of the provision 'routinely' instead of 'resorting to it exceptionally' for the purposes of gathering springboard and lead evidence alike.[48] Support for the Trial Chamber's I conclusion can be drawn from the words of the Deputy-Prosecutor, who in reaction to a question of the presiding judge said at a status conference meeting on 6 May 2008: "*Of course, there was never any intention on the side of the OTP, and it was also understood as such by the United Nations, that these materials were received only for lead purposes. The need was to obtain the necessary materials as quickly as possible for the sake of the ongoing investigation and then to allow the OTP to identify the materials it wishes to use as evidence and then seek permission*."[49] By this means Trial Chamber I in the Case *Prosecutor vs. Thomas Lubanga Dyilo* appears to have focused on an opposite priority – how to spur the Prosecutor on to new investigative leads and, in a sense, how to stage-manage the pace and delivery of his investigative work so as to accelerate towards the trial.[50] The sitting judges determined that secret evidence could not be used for trial, notwithstanding that OTP had not acted with malicious intent when entering upon the mentioned confidentiality agreements, the proceedings lacked some preconditions of a fair trial, since restrictions on disclosure of evidence must in any case conform to the limited exceptions permissible under international human rights law.[51]

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[45] *Thomas Lubanga Dyilo, decision on non-disclosure*, paras. 14-19; see also Swoboda, "The ICC Disclosure Regime – A Defence Perspective", (2008) 19 *Criminal Law Forum*, 449, 463.
[46] *Thomas Lubanga Dyilo, decision on non-disclosure*, paras. 93-94
[47] ICC-01/04-01/06-1418 *Decision on the release of Thomas Lubanga Dyilo* Trial Chamber I 2 July 2008, para. 34
[48] ICC 01/04-01/06, *Decision on the consequences of non-disclosure of exculpatory materials covered by Art. 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo* Trial Chamber I 13 June 2008, para. 76.
[49] ICC-01/04-01/06-T-86-ENG, Transcript of the Hearing, Trial Chamber I, 6 May 2008, p. 23, lines 7-14.
[50] Scheffer , "A review of the Experiences of the Pre-Trial Chamber and Appeals Chamber of the International Criminal Court regarding the Disclosure of Evidence" (2008) 21 *Leiden Journal of Int`l L.*, 151, 157.
[51] This is of particular relevance due to the competing interests in criminal proceedings; see Trechsel, *Human Rights in Criminal Proceedings* (2005), pp. 92-93.

Meanwhile OTP took together with the confidential information providers in particular the United Nations the necessary steps to remedy the lack of disclosure.[52] The decision taken by Trial Chamber I on 18th November 2008, reflects the success of these efforts through its announcement to lift the stay of the proceedings in the Case *Prosecutor vs. Thomas Lubanga Dyilo* because the reasons for imposing the stay had been overcome. In its decision Trial Chamber I also decided to keep the accused in detention. As a result of the decision to revive the trial, Presiding Judge Fulford announced a provisional calendar for outstanding matters. On 19th November 2008, OTP completed disclosure of documents to the defence in a "*user friendly way*" as expected by Trial Chamber I in its previous decisions. On 18th November 2008 the judges further announced a trial date of the 26th January 2009, which was further set into practice on the aspired date.[53]

V. Conclusion

Having regard to the core principle of "Equality of Arms", the non-disclosure of evidence may constitute an infringement to the right of the defence[54] In fact as observed by Judge Vohrah in his separate opinion before the ICTY:

"The application of the equality of arms principle, especially in criminal proceedings, should be inclined in favour of the defence acquiring parity with the prosecution in the presentation of the defence case before court to preclude any injustice against the accused"[55]

It is the interpretation of the principle of the "Equality of Arms", in particular, with respect to the imposition of a broad duty onto OTP to disclose evidence to the defence that has often proved difficult. In the Case *Prosecutor vs. Thomas Lubanga Dyilo* and in an Annex to the *Decision on the Final System of Disclosure and the Establishment of a Timetable*[56] single

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[52] Human Rights Watch, ICC: Congo Ruling Victory for Justice, available at, http://www.hrw.org/en/news/2008/11/18/icc-congo-ruling-victory-justice (last visited on, 03/12/2008).

[53] ICC-CPI-20081118-PR372, ICC Press Release 18.11.2008, Stay of Proceedings in the *Case v. Thomas Lubanga Dyilo* is lifted - Trial provisionally scheduled for 26 January 2009, ; see also ICC-CPI-20090123-PR388, ICC Press Release, 23.01.2009, Opening of the first trial of the Court on Monday 26 January 2009: for the first time in the history of international law the victims will fully participate in the proceedings.

[54] Case T-57/01, *Solvay SA* v. *Commission of the European Communities*, [1995] ECR-II 1775, 1802 at 1812–1813, citing the judgment of the Court of Justice of the European Communities in Case 85/76, *Hoffman-La Roche v. Commission of the European Communities*, [1979] ECR 461.

[55] Case No. IT-94-T, *Prosecutor* v. *Tadic* On the Prosecution Motion for the Production of Defence Witness Statements, 27 November 1996, available at: http://www.un.org/icty/tadic/trialc2/decision-e/61127ws21.htm (last visited on 02/12/2008).

[56] ICC-01/04-01/06-102, The Prosecutor v. Thomas Lubanga Dyilo, PTC I, *Decision on the Final System of Disclosure and the Establishement of a Timetable*, 15. May 2006.

Judge Sylvia Steiner outlined an important elaboration on the final system of disclosure to be applied in further proceedings before the ICC. Her decision takes a rather balanced view on the issue, favouring *inter partes* disclosure prior to communication,[57] while emphasising the aim of the disclosure procedure as providing a "*key role*"[58] to guarantee the accused the right to a fair trial and the effectiveness of the proceedings.[59] In order to facilitate this approach, strong reasons do exist for the strict application and further interpretation of the Rules and Regulations enshrined in the ICC´s legal framework with regard to the system of disclosure to uphold fairness and transparency in every stage of the proceedings. In a fair and equitable trial, OTP must act according to the premises of the disclosure regime to guarantee the accused a fair trial, without unfairly surprising him. If investigations in the area of the alleged conduct cannot be taken without endangering the involved victims and witnesses, the efforts of the international community to bring the perpetrator to justice will have to be deferred.[60]

In future cases approaching before the ICC the assigned Chambers must give due regard to the delicate relationship between the continuing obligation of disclosure, ongoing investigations and the rights of the accused. Where violations of the defendant's rights occur due to non-disclosure, whatever remedy is ordered by the Chambers, it should not be crafted to discipline the Prosecutor *per se*, nor should it allow him to be given an advantage by his failure to disclose. The ICC must provide attentiveness and combat secretiveness at every stage where disclosure is at stake.[61] Deficits at this phase will almost inevitably vitiate the whole trial. Benefiting from the experience of the ad-hoc tribunals the ICC by obeying to its primary cause of bringing perpetrators to justice and thereby following its compound legal framework will have the opportunity to enhance the credibility of international criminal proceedings, by both securing procedural and substantial equality.

[57] ICC-01/04-01/06-102, The Prosecutor v. Thomas Lubanga Dyilo, PTC I, *Decision on the Final System of Disclosure and the Establishement of a Timetable*, 15. May 2006, para. 63 of the Annex.
[58] ICC-01/04-01/06-102, The Prosecutor v. Thomas Lubanga Dyilo, PTC I, *Decision on the Final System of Disclosure and the Establishement of a Timetable*, 15. May 2006, para. 73 of the Annex.
[59]01/04-01/06-102, The Prosecutor v. Thomas Lubanga Dyilo, PTC I, *Decision on the Final System of Disclosure and the Establishement of a Timetable*, 15. May 2006, para. 66 of the Annex.
[60] Swoboda, "The ICC Disclosure Regime – A Defence Perspective", (2008) 19 *Criminal Law Forum*, 449, 472.
[61] Compare Nahamya/Diarra, "Disclosure of Evidence before the International Criminal Tribunal For Rwanda" (2002) 13 *Criminal Law Forum*, 339, 363.